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In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First District

BRIEF OF *AMICI CURIAE* CONSUMERS UNION AND CONSUMER ACTION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress enacted § 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831(a), which expressly preempts state limitations on interest rates that may be charged by state-chartered banking institutions, did Congress also intend to preempt all other state consumer protection legislation restricting non-interest charges and penalty fees, including late fees, that may be imposed on consumers?

2. Assuming Congress did not intend to preempt state consumer protection statutes limiting the imposition of penalty fees, did Congress intend to allow certain deregulated states, such as Delaware, to expand the preemptive scope of § 521 by creating broad, all-inclusive definitions of the term "interest."

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INTEREST OF AMICI[1]

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with approximately 5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. Consumers Union has offices in Yonkers, New York, Washington, D.C., Austin, Texas and San Francisco, California.

One of Consumers Union's activities is to provide legislative and administrative advocacy at the national and state level on issues that affect the quality of life for consumers, including issues affecting credit and banking services. Consumers Union has a substantial interest in this litigation because the Court of Appeals' holding that § 521 of the DIDA, 12 U.S.C. § 1831d(a), preempts states' efforts to enforce consumer protection statutes against

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[1] Pursuant to Supreme Court Rule 37.2, letters expressing the written consent of the parties to the filing of this brief on behalf of *amici* Consumers Union and Consumer Action are filed herewith.

out-of-state credit card issuers will significantly impair Consumers Union's ability to advocate for state consumer protection legislation affecting credit card users in California and elsewhere.

Consumer Action is a non-profit, membership organization committed to consumer education and advocacy. The organization was established twenty-one years ago in California and currently has approximately 1600 members. As a service to consumers in California and elsewhere, the organization publishes and distributes approximately 1 million pieces of literature per year, in eight different languages, on banking, credit and utility issues, including an annual survey of bank credit card terms. In addition, the organization is actively involved in policy and legislative advocacy on credit and banking issues on behalf of consumers at both the state and national levels. Consumer Action has an interest in this litigation because members of the organization are entitled to the protection of state legislation prohibiting excessive fees and because the Court of Appeals' finding that § 521 preempts state statutory provisions prohibiting late fees will significantly impair Consumer Action's ability to lobby for consumer protection legislation in California and elsewhere.

INTRODUCTION

Consumers Union and Consumer Action submit this brief as *amici curiae* in support of Petitioner, the Commonwealth of Massachusetts ("Massachusetts"), and urge this Court to grant a writ of *certiorari*, reverse the decision of the First Circuit Court of Appeals, and decide the important issue of whether § 521 of the Depository Institutions

Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d(a), precludes states with consumer protection statutes from enforcing prohibitions against excessive penalty charges imposed by out-of-state credit card issuers.

A penalty fee is a fee, usually between $10 and $15, imposed by banks on credit card users who make a late payment, exceed their credit limit, or make a payment with a check drawn on insufficient funds. These fees are imposed by banks separate from and in addition to the interest charges imposed each month and the annual fee, which statistics show provide more than ample profits for issuers.[2] Penalty fees cost consumers over $1 billion last year, causing them substantial financial injury. Although the particular fee at issue in this case is a $10 late fee, the preemption issues raised are equally applicable to all penalty charges.

Recognizing that penalty fees can often catch consumers unaware and present a serious financial burden, a growing number of state legislatures has prohibited these fees as unfair and deceptive. In addition to petitioner Massachusetts, several other states, including Pennsylvania, Minnesota, Iowa and Maine, among others, have either limited or prohibited late and overlimit fees and are now moving to enforce these statutes against out-of-state lenders.[3] The important issue presented by this litigation

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[2] Most credit card issuers are banks. Recently, non-banking corporations, including AT&T and General Motors, have begun entering the market. Throughout this brief, the term "issuer" refers generally to both bank and non-bank issuers of credit cards.

[3] California has a more general statute that prohibits the imposition of unlawful liquidated damages on consumers. California

is whether § 521 of DIDA, which expressly preempts only state statutes limiting the *interest rate* that may be charged by state chartered banks, also preempts those state consumer protection statutes which regulate non-interest, penalty fees. In particular, the issue is whether, under § 521, banks chartered in deregulated states may "export" penalty fees allowed in their home state to consumers residing in other states where the fees are prohibited.

The First Circuit interpreted the term "interest" in § 521 broadly, holding that Respondent Greenwood Trust Company ("Greenwood") could export fees allowed by Delaware and impose them on consumers in Massachusetts. This expansive interpretation, which is not supported by either the language of the statute or its legislative history, will cause substantial injury to consumers. If not reversed, the ruling below will permit a few small states that have chosen to cater to banking interests to deregulate the industry on a national basis. Furthermore, the interpretation of the Court of Appeals below undermines state consumer protection efforts because allowing banks chartered in small, deregulated states to export penalty fees creates pressure on other states to repeal consumer protection statutes in order to retain banking and credit card-related jobs and revenues in an increasingly concentrated banking industry. As the credit card industry becomes more dominant in the marketplace and more concentrated in deregulated states, it

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Civil Code § 1671(c) and (d). That statute, as interpreted, prohibits lenders and credit card issuers from charging and retaining any sums from penalty fees that exceed the actual damages caused by a consumer's breach of the credit agreement. *See e.g. Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 9 Cal.3d 731, 511 P.2d 1197 (1973); *Beasley v. Wells Fargo Bank, N.A.*, 235 Cal.App.3d 1383, 1 Cal.Rptr. 2d 446 (1991), *rev. denied.*

is vital that consumers receive the protection of state statutes limiting penalty charges and other unfair practices.

SUMMARY OF ARGUMENT

Consumers Union and Consumer Action, non-profit consumer organizations, urge this Court to grant a writ of *certiorari* to Massachusetts because the decision of the First Circuit, expansively interpreting the preemptive effect of § 521 of DIDA, raises important issues nationally for consumers and states attempting to enforce consumer protection legislation. Credit cards are a rapidly growing, extremely profitable industry within which consumers have limited choices and often find themselves at the mercy of card issuers. The First Circuit's holding allowing exportation of penalty fees, including late charges, from deregulated states favoring banking interests, causes substantial injury to consumers in two ways. First, the great majority of consumers already pay substantial non-market based interest charges for the use of a credit card; additional penalty fees are unnecessary and oppressive. This is particularly true because consumers generally incur penalty fees as a result of circumstances beyond their control. Second, a broad interpretation of § 521 allowing the exportation of penalty fees undermines states' legitimate efforts to enforce consumer protection legislation limiting such fees and creates pressure for state legislatures to deregulate in this area. Because of the importance of these issues and their effect on the welfare of consumers throughout the country, this Court should grant *certiorari* to determine whether the First Circuit improperly interpreted the preemptive scope of § 521 beyond that apparent in the statute, intended by

Congress, or sanctioned by this Court's recent preemption jurisprudence.

ARGUMENT

Credit cards have become an increasingly dominant segment of the American economy. Credit card lending is an extremely lucrative industry for banks and other issuers that significantly impacts on the financial welfare of consumers. The imposition of penalty fees separate from and in addition to interest charges is a growing practice in the industry, creating adverse impacts on consumer cardholders and raising issues of concern to state legislatures. The First Circuit's expansive interpretation of § 521, based neither on its language nor its legislative history, allowing the exportation of penalty fees from deregulated states, will injure consumers in two ways. First, there is the direct injury to consumers that results from the imposition of penalty fees by banks chartered in deregulated states – fees which cost consumers over $1 billion per year. In addition, there is the secondary injury that results from the erosion of consumer protection statutes in currently regulated states around the country as banks threaten to relocate their credit card operations to deregulated states in order to obtain more favorable terms.

I. ALTHOUGH THE CREDIT CARD INDUSTRY IS GROWING RAPIDLY AND IS EXTREMELY PROFITABLE, THE MARKET IS LARGELY NON-COMPETITIVE ON INTEREST RATES AND PENALTY FEES, PROVIDING CONSUMERS WITH MINIMAL INFORMATION AND LIMITED CHOICES.

The credit card industry grew at a phenomenal rate in the decade of the 1980's. In 1981, there was $31.8

billion in outstandings on bank credit cards in the United States.[4] By 1990, that figure had grown to $180.5 billion, an explosion in growth of over 560 percent. *See* Credit Card Management, *Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States,* at 26 (1992 ed). During that same time, the charge volume on Visa credit cards went from $33.0 billion in 1981 to $158.1 billion in 1990. Charge volume on Mastercards increased from $26.1 billion in 1981 to $93.1 billion in 1990. *Id.,* at 24. These increases represented an average *annual* growth in Visa and Mastercard outstanding balances of 23 and 21 percent respectively. *See* Calem, "The Strange Behavior of the Credit Card Market," *Federal Reserve Bank of Philadelphia Business Review,* at 6 (January/February, 1992). In 1991, credit cards generated approximately $34.24 billion in revenues for the banking industry and $5.83 billion in pre-tax profits. *The Nilson Report,* at 5 (Nov. 14, 1991).[5]

It is estimated that eight out of ten households in the United States currently hold one or more credit cards. The average household charged $885 per year at the beginning of the 1980's; by 1990, the average household was charging approximately $3,753 per year. *See* "The Big

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[4] The term "outstandings" refers to the amount of outstanding debt on all credit card accounts of a particular issuer at a given time. The term "charge volume" refers to the total dollar amount of purchases and services charged to an issuer's credit card portfolio for a stated duration.

[5] References to credit card profits in the banking industry do *not* include the additional profits earned by non-bank issuers of credit cards that have been entering the market in recent months.

Squeeze" *The Economist* (Nov. 2, 1991). A typical cardholder currently owes $2,350 on all of his credit cards. In 1980, that figure was only $350. *Id.* Approximately three-quarters of cardholders are borrowers who pay high-interest charges on a monthly basis (as opposed to convenience users who pay in full each month). *See* Ausubel, "The Failure of Competition in the Credit Card Market," *The American Economic Review,* at 71 (March, 1991).

This explosion in credit card growth has translated into phenomenal profits for the banking industry. In 1991, after-tax profits earned by the credit card operations of banks issuing Mastercard and Visa credit cards were estimated to be $3.5 billion. That figure was slightly lower than the $4 billion in after-tax profits earned in 1990 and the $4.11 billion earned in 1989. *See The Nilson Report,* at 1 (Nov. 14, 1991). These profits are significantly higher than the ordinary rate of return in the banking industry as a whole. In a 1991 article, Lawrence M. Ausubel, Professor of Economics at Northwestern University, demonstrated that banks issuing credit cards earned profits on their card operations of *three to five times* the ordinary rate of return in the banking industry. *See* Ausubel, "The Failure of Competition in the Credit Card Market," *supra,* at 50. The Federal Reserve Board corroborated this finding in September of 1991 in a report submitted to Congress and predicted that credit card operations would continue to earn high profits in the future. *See* Calem, "The Strange Behavior of the Credit Card Market," *supra,* at 7.

There are two primary reasons that credit card operations are so profitable for issuing banks. First, the annual interest rates charged by most issuers are currently averaging about five to six times the discount rate and federal funds rate (the rates at which banks may borrow funds

from the Federal Reserve and from other banks, respectively).[6] In 1991, of the top ten credit card issuers (measured by outstandings), which control over 50 percent of the market, eight charged an annual interest rate of 19.8 percent, including Greenwood, and one charged an even higher rate of 21.9 percent.[7] *See Card Industry Directory, supra*, at 35, 37. The *average* interest rate among the top 25 card issuers, which control over 70 percent of the market, was 18.9 percent in 1991; the average interest rate among the top 250 issuers, which control over 90 percent of the market, was 17.79 percent for that same period. *Id.* This means that most banks in the credit card market, including all of the major banks, are currently collecting interest from consumers at more than five times the rate at which the banks are able to borrow funds. *Id. See also* "Pushing Plastic Is Still One Juicy Game," *Business Week*, at 76 (Sept. 21, 1992).

The second reason credit card operations are so profitable is that the industry is generally *non-competitive* on interest rates and other pricing terms (including penalty fees), providing consumers with minimal information and limited choices. In "The Failure of Competition in the Credit Card Market," *supra*, Ausubel analyzed the cost of funds to issuing banks for the period of 1982 to 1989 and

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[6] Since July 2, 1992, the Federal Reserve discount rate in the Ninth District has been 3.0 percent; the federal funds rate for the week ending November 27, 1992 was 3.10 percent. Although some card issuers have lowered interest rates in recent months for "preferred" or "premier" cardholders, most interest rates remain in the 17 to 20 percent range.

[7] The other bank is the American Express Centurion Bank, which requires customers to pay their balance in full each month.

compared it to interest rates during the same period. He concluded that despite several fluctuations and a general decrease in the cost of funds, "[c]redit card interest rates were highly sticky during the period 1982-1989 and, in fact, were virtually constant." Ausubel, at 53.[8] Rejecting the argument that this phenomenon was attributable to an increase in the industry's rate of bad loans, Ausubel documented that during this same period credit card profits rose dramatically. *Id.*, at 57. The only explanation for the coexistence of these two market phenomena – price "stickiness" and substantial profitability – is that the competitive model of market behavior has failed in the credit card industry, leaving the industry almost entirely non-competitive on fundamental pricing terms such as interest rates and other fees. *See generally* Ausubel, *supra*. As another economist recently observed,

> Despite the large number of card issuers and the ease of entry into the industry, the performance of the bank card industry diverges from the textbook model of a competitive market. Profits have been unusually high, credit card interest rates, on average, do not move in tandem with banks' costs of funds, and card issuers engage in a significant amount of nonprice competition. Calem, "The Strange Behavior of the Credit Card Market," *supra*, at 7.

Although credit card issuers do compete, they do so by offering and advertising non-pricing frills and benefits, rather than lower interest rates and fees. "In contrast to the textbook model of competition, bank card issuers vie for customers by means other than competing on

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[8] The concept of "stickiness" means that the factor observed, interest rates, did not move in tandem with other factors as it should have.

interest rates. These firms actively engage in *nonprice competition,* which takes the form of widespread advertising and offers of special services or benefits to cardholders." Calem, *supra,* at 9 (emphasis in original).[9] Because there is little divergence among card issuers on interest rates and penalty fees, consumers find it difficult to make informed choices about their credit cards based on these pricing terms. Banks do not advertise penalty fees in their marketing, making it difficult for consumers to find out about penalty fee terms. Moreover, because most consumers do not intend to make late payments or exceed their credit limits at the time they accept a credit card, they do not compare terms or choose a credit card on that basis. Finally, because many consumers carry a sizeable outstanding balance on their card accounts from month to month, it can be difficult for these consumers to switch from one credit card issuer to another after they discover that their card issuer imposes unfair penalty fees.[10] These factors combine to leave consumers largely at the mercy of their credit card issuers.

II. PENALTY FEES ARE A PROFIT-MAKING MECHANISM THAT CAUSES CONSUMERS SUBSTANTIAL INJURY.

In a climate of extraordinary profitability and noncompetitive pricing terms, penalty fees have become yet

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[9] For example, many card-issuing banks have recently teamed up with major airlines to offer credit cards through which consumers can earn "mileage credits" that can be used for future flights, discount fares, or upgraded seating. General Motors recently launched its own credit card into the market offering consumers a rebate on any future car purchase based on total charges on the GM card.

[10] Approximately 75 percent of cardholders carry an outstanding balance from month to month. *See* Ausbul, *supra,* at 71.

another way for banks to extract profits from consumers. According to surveys published last year, over 65 percent of banks now charge late fees. That percentage is up from 50 percent in 1987 and 56.3 percent in 1988. A growing number of banks also now charge overlimit fees. The percentage of banks charging an overlimit fee increased from 32 percent in 1987 to 42 percent in 1988, and to 50 percent in 1989. *See* Stewart, "How Penalty Fees Are Rewarding Banks," *Credit Card Management*, at 39-40 (Nov., 1991). Similarly, the amount of the charges imposed has increased sharply in recent years. The average late fee for a regular Visa card shot up 22 percent, from $6.56 in 1987 to $8.03 in 1989. The average overlimit charge at the end of 1989 was $11. *Id.* The late fee charged by Greenwood, the second largest card issuer in the country, is $10. The penalty fees currently charged on regular accounts by Citibank, the largest card issuer in the country, are $15 for a late payment and $10 for an overlimit charge.

Banks have been steadily increasing their penalty fees because they are profitable. In 1991, banks issuing Visa and Mastercards collected an estimated $1.16 billion in penalty fees (late, overlimit fees and bounced check). *The Nilson Report*, at 5 (Nov. 11, 1991). This represented approximately three percent of the banks' total credit card revenues of $34.24 billion, and an increase in penalty fees of approximately 15 percent over 1990. *Id.* Penalty fees provide significant revenue, not just cost reimbursement, to issuing banks. *See* Stewart, "How Penalty Fees are Rewarding Banks," *supra*, at 39-43. In this article, the author notes that penalty fees "represent a significant revenue opportunity" that can provide revenue well in

excess of extra costs incurred as a result of late payments or overlimit activity.

> Some issuers argue they make the charges to cover extra costs incurred. But Auriemma Consulting Group Inc. looked at a broad range of nuisance fees – tariffs for card replacement and extra copies of statements as well as late payment, bounced checks and exceeding credit limits – and concluded they account for at least 60 basis points of the average bank card return on assets, up from around 30 points a few years ago.
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> *Id.*

Class action consumer litigation filed against credit card issuing banks in California has confirmed that bank penalty fees are generally set to exceed substantially their costs. In *Beasley v. Wells Fargo Bank, N.A., supra,* 1 Cal.Rptr. 2d, at 446, an action brought under California law, after a full trial on the merits a jury awarded the statewide plaintiff class more than $5.2 million as damages for charges the bank had collected in late and overlimit fees in excess of the banks' costs incurred to collect and account for late payments and overlimit balances.[11] Similar cases against Crocker National Bank and Security

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[11] California law requires that penalty fees, which are essentially liquidated damages by virtue of the language in standard form credit card agreements, be reasonably related to the costs a bank actually incurs in collecting and accounting for late payment or overlimit balances. *See e.g.* California Civil Code § 1617(c) and (d); *Garrett v. Coast & Southern Fed. Sav. & Loan Assn. supra,* 9 Cal.3d, at 731.

Pacific National Bank resulted in settlements of $3.8 million and $2.6 million, respectively, for the statewide plaintiff classes.[12] Thus, while banks may defend their penalty fees by citing higher costs incurred directly in collection activity resulting from breach, real scrutiny reveals that, in fact, the fees charged and collected are generally far in excess of the banks' costs and are used, not to compensate for costs resulting from cardholder breach, but to provide an additional source of revenue and profit. *See Beasley v. Wells Fargo Bank, supra,* 1 Cal.Rptr.2d, at 448, 452.

While penalty fees simply represent more profits for banks, they represent a significant financial injury for consumers. Last year, penalty fees cost consumers over $1 billion. Considering that consumers are already paying substantial interest charges on delinquent and overlimit balances, an additional penalty fee of $10 or $15 is both unnecessary and oppressive. This is especially true given that consumers generally incur penalty fees as a result of circumstances beyond their control. An article reported earlier this year that one consumer in Pennsylvania, who is currently suing Citibank over its late fees, fell behind in her payments as a result of job change. Within only a few months, she had incurred more than $60.00 in late fees on her $2000 balance; these fees were *in addition to* the interest charges of approximately $30.00 per month she was already paying. *See* "Mad As Hell About Late

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[12] *Kovitz, et al. v. Crocker National Bank, et al.* (superior Court of San Francisco Case No. 868914); *McClendon v. Security Pacific National Bank* (Superior Court of Alameda County Case No. 613722-5).

Fees," *Business Week*, at 32 (Feb. 24, 1992). Because consumers can unwittingly find themselves in these situations and suffer significant financial injury, it is important that consumers be entitled to the protection of their own elected state representatives and that states be able to enforce consumer protection legislation limiting excessive penalty fees.

III. THE EXPANSIVE INTERPRETATION OF § 521 OF DIDA ADOPTED BY THE FIRST CIRCUIT INJURES CONSUMERS BY ALLOWING SMALL, DEREGULATED STATES SUCH AS DELAWARE TO SET CREDIT TERMS FOR CONSUMERS THROUGHOUT THE NATION AND BY CREATING PRESSURE ON OTHER STATES TO AVOID OR TO REPEAL CONSUMER PROTECTION LEGISLATION.

The First Circuit held that the meaning of the term "interest" in § 521, and its preemptive scope, was to be determined by looking to state law constructions of the term, specifically the construction of the term "interest" in Delaware law, the state in which respondent Greenwood is chartered. This conclusion renders the term "interest" in § 521 essentially meaningless. Moreover, because of the concentration of the market within certain mega-banks, located in deregulated states, it effectively allows these states to expand the scope of preemption in § 521 well beyond the expressed intention of Congress and to define allowable credit terms for the rest of the nation.

Certain deregulated states dominate the credit card industry. The ten largest issuers of credit cards in this country control over 53 percent of the market. Six of these issuers are located in Delaware; the largest issuer is

located in South Dakota (Citibank). *See Card Industry Directory, supra,* at 35. These two states have undertaken a deliberate strategy to attract large credit card operations by creating an extremely favorable regulatory environment. *See* "Small States Teach a Big Banking Lesson," *Chicago Fed. Letter* (June, 1986). From 1980 to 1987, credit card loans from commercial banks increased by $72.4 billion; banks located in Delaware and South Dakota accounted for over half of that increase. *Id.* In order to achieve this result, in the early 1980's, the two states repealed consumer protection legislation applicable to consumer credit card lending, passed laws favorable to banking interests, including laws allowing various non-interest fees, and undertook an aggressive campaign to entice credit card operations to relocate from other states. *Id.* The huge increase in credit card loans from these states in the following years demonstrates the success of the strategy.

If, as the Court of Appeals held below, the term "interest rate" in § 521 has no meaning other than how the home state defines it, and if all charges defined by the home state as "interest" may be exported to consumers in other states, obviously deregulated states such as Delaware and South Dakota will define any number of different charges as in the nature of "interest" on a loan. If the decision of the Court of Appeals is allowed to stand, credit card issuers located in these states can then invoke the protection of § 521 and export a variety of penalty fees, as well as other non-interest charges such as annual fees, to all other states in which they issue credit cards. This effectively allows certain small, sparsely-populated, deregulated states to set credit card terms for the entire nation. If Congress did not intend in enacting § 521 to

establish national consumer credit standards, surely Congress could not have intended that the statute operate to allow *Delaware* to define national standards (or lack thereof) for credit card lending. The states of Delaware and South Dakota have made a conscious choice to subordinate consumer interests to the development of banking enterprises; they should not be allowed to make this same choice for all consumers residing in the other 48 states. Nor should Delaware and South Dakota be able to preempt the economic and policy decisions made in this area by other state legislatures.[13]

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[13] It is well-established that regulation of lending practices for the protection of consumers is a historically-recognized power of the states. *See e.g. Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980); *Perdue v. Crocker National Bank*, 38 Cal.3d 913, 937, 702 P.2d 503 (Cal. 1985), *appeal dismissed* 475 U.S. 1001 (1986). As this Court emphasized only last term, the scope of Congressional intent to preempt such areas must be *narrowly construed*. *Cippollone v. Ligget Group, Inc.*, ___ U.S. ___, 112 S.Ct. 2608, 2617 (1992). "[T]he historic police powers of the States are not to be superseded by . . . [the] Federal Act unless that is the clear and manifest purpose of Congress." *Id.*, at 2617.

Another recent decision of this Court addressing the preemptive scope of the Employees Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), stands in stark contrast to the expansive interpretation of § 521 adopted by the Court of Appeals below. In *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1669 (1989), this court unanimously held that ERISA did not preempt a Massachusetts criminal statute requiring employers to pay employees for unused vacation time. Although ERISA has much broader preemptive language than § 521 of DIDA, preempting "any and all state laws insofar as they . . . *relate to* any employee benefit plan," 29 U.S.C. § 1144(a) (emphasis added), this Court declined to find preemption of the Massachusetts statute enacted for the protection of employees.

The interpretation of § 521 of DIDA adopted by the First Circuit further injures consumers by creating substantial pressure on states such as Massachusetts to deregulate its own consumer credit industry. This pressure arises because the interpretation of the Court of Appeals below would give banks chartered in deregulated states a financial advantage *in other states* over local banks. This disadvantages local banks in states that have consumer protection legislation to the significant advantage of the huge dominant national lenders located in deregulated states. The result is a chain reaction "race to the bottom." Banks claim they are not earning enough profit and threaten to leave states with consumer protection legislation, state legislators become concerned about losing jobs and revenues, and the legislation is repealed.

This pressure on states to repeal their consumer protection legislation caused by deregulation in other states was explained in a publication of the Federal Reserve Bank of Chicago in June 1986. The publication reported that, "after the successes in South Dakota and Delaware, other states, including those in the Seventh District, found it necessary to play follow-the-leader. Some of the banks in these states were either moving their credit card operations to South Dakota or Delaware or were threatening to do so." *Id.* The report notes that Illinois was forced

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> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with the "separate spheres of governmental authority preserved in a federalist system."
> *Id.*, at 1675, *quoting Fort Halifax Packing Co. v. Cayne*, 482 U.S. 1, 19 (1987).

to eliminate its interest rate ceilings on credit cards in 1981; Indiana had to lift its usury ceilings in 1981 and again in 1982; and Iowa eliminated its interest rate cap and limits on annual fees in 1984 after one major bank threatened to leave. *Id.* Iowa raised its limits on late fees under similar circumstances in 1989. Louisiana and Georgia lifted all restrictions on credit card lending in 1987, hoping to attract more jobs in the banking industry. *See* "Group Advocates State Regulation of Credit Cards," *American Banker,* p. 3 (July 29, 1987). The decision of the First Circuit allowing exportation of penalty fees, as well as interest rates, will only increase this pressure to deregulate. Indeed, recently, the pressure to deregulate has focused particularly on late fees. According to a recent report in *Business Week,* "[o]n February 3 [1992], Chemical Bank persuaded New York legislators to eliminate the state's 10-day waiting period before banks can begin charging late fees. Lawmakers apparently feared that Chemical might move the Long Island card-processing operation of its merger partner, Manufacturers Hanover Co., to Delaware." *See* "Mad As Hell About Late Fees," *supra,* at 32.

In contrast, if this Court reverses the decision of the Court of Appeals, and limits the preemptive scope of § 521 to its expressed intent to preempt *interest rates,* this would eliminate the pressure on states to deregulate penalty fees. As Congress intended, banks issuing credit cards would remain subject to the consumer protection laws of the states in which the cardholders reside and would not be able to avoid restrictions on excessive penalty fees by relocating to a deregulated state. States would then be able to enforce their prohibitions against

excessive fees, whether imposed by in-state or out-of-state issuers, without fearing defections by local banks.

CONCLUSION

For all the foregoing reasons, *amici* Consumers Union and Consumer Action urge this Court to grant the petition for a writ of *certiorari* filed by Massachusetts.

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